

Memo

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To: Local Authorities

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Statutory implications of the Marine and Coastal Area (Takutai Moana) Act 2011

Introduction

1. This Memorandum provides an overview of some of the key implications arising from the Marine and Coastal Area (Takutai Moana) Act 2011 ("MACA") that we have identified as being of interest to local authorities.
2. There are a number of complexities in the MACA regime, including in terms of how it interacts with other statutes such as the RMA, and so this Memorandum provides only an overview (rather than a detailed analysis) of the implications of MACA.
3. This Memorandum addresses:
 - (a) **Part A:** Background information;
 - (b) **Part B:** Immediate obligations under MACA;
 - (c) **Part C:** Obligations once rights are formally recognised:
 - (i) Protected Customary Rights;
 - (ii) Customary Marine Title;
 - (d) **Part D:** Exemptions; and
 - (e) **Part E:** Conclusion.

Part A: Background information

4. MACA came into force in 2011 and replaced the Foreshore and Seabed Act 2004. The new Act implemented a 'no-ownership' regime over the marine and coastal area (with some limited exceptions) and introduced mechanisms to recognise Māori customary rights in that area.
5. Those mechanisms include:
 - (a) participation rights in certain conservation processes (for example, in relation to conservation protected areas such as reserves, marine reserves or marine mammal sanctuaries);
 - (b) 'protected customary rights' ("PCRs") (allowing certain traditional practices to be exercised without undue regulatory constraint); and
 - (c) customary marine title ("CMT") (a mechanism similar to (but not) ownership).

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6. This document focuses primarily on PCRs and CMT, although local authorities should be aware of the conservation processes that also apply to reserves that exist below the line of mean high water springs.
 7. Applications for PCRs or CMT can be made under MACA by one or more iwi, hapū or whanaū group, and can be made by a legal entity or natural person appointed as representative of one or more of those groups.
 8. PCRs or CMT can be recognised through either:
 - (a) a recognition agreement negotiated directly with the Crown ("**direct engagement**"); or
 - (b) a recognition order issued by the High Court ("**High Court proceedings**").
 9. An applicant may, and many have, applied under both processes.
 10. As you are aware, there have been numerous applications for PCRs and/or CMT made since MACA came into force, the majority of these being lodged in the weeks preceding the close of the statutory application period on 3 April 2017.
 11. The tests for achieving PCRs and CMT are set out in MACA. It is early days in terms of processing these applications, and it is currently not clear how the Crown and the High Court will apply those statutory tests, or how many PCRs and CMT applications will be recognised.

Part B: Immediate obligations under MACA

12. The majority of obligations under MACA apply only after the rights are formally recognised, which is the date on which the High Court order is sealed, or in the case of an agreement, the date on which the agreement is brought into effect.
13. One key exception, which relates to applications for CMT, is the obligation on resource consent applicants under section 62 of MACA as follows:
 - (2) *Subsection (3) applies if a person applies for a resource consent, a permit, or an approval in relation to a part of the common marine and coastal area in respect of which—*
 - (a) *no customary marine title order or agreement applies; but*
 - (b) *either—*
 - (i) *an applicant group has applied to the Court under section 100 for recognition of customary marine title and notice has been given in accordance with section 103; or*
 - (ii) *an applicant group has applied to enter negotiations under section 95.*
 - (3) *Before a person may lodge an application that relates to a right conferred by a customary marine title order or agreement, that person must—*
 - (a) **notify** the applicant group about the application; and
 - (b) **seek the views** of the group on the application.

(emphasis added)
14. This obligation requires an applicant for resource consent to notify and seek the views of an applicant for CMT, before the resource consent application is lodged.
15. Importantly, this obligation arises now - i.e as soon as a CMT application for direct engagement is lodged with the Crown or an application for High Court proceedings is lodged with the Court.

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16. That obligation applies "*before a person may lodge*" an application for resource consent, and presumably a local authority should not accept an application without evidence of compliance with section 62(3) of MACA. The exact nature of local authorities' obligations in this regard is not clear. Having looked into the Departmental Report on the Marine and Coastal Area Bill, it is apparent that this specific ambiguity was raised as a concern, however this did not translate into an RMA amendment to clarify local authorities' obligations when processing applications.
 17. Further, it is not entirely clear what "*an application that relates to a right conferred by a customary marine title order or agreement*" means and whether that is also intended to apply to resource consent applications outside of (but 'relating to') CMT areas.

Part C: Obligations once rights are formally recognised

Protected Customary Rights

18. Under the RMA, the protection of PCRs is a matter of national importance that must be "recognised and provided for" in accordance with section 6 of that Act.
19. Section 55 of MACA sets out the effect of PCR on resource consent applications lodged after the date on which a PCRs take effect. Of particular note is subsection 2 which states;
 - (2) *A consent authority must not grant a resource consent for an activity (including a controlled activity) to be carried out in a protected customary rights area if the activity will, or is likely to, have adverse effects that are more than minor on the exercise of a protected customary right, unless—*
 - (a) *the relevant protected customary rights group gives its written approval for the proposed activity; or*
 - (b) *the activity is one to which subsection (3) applies.*

(...)
20. Section 87A(2)(a) of the RMA cross-refers to section 55 of MACA as an additional exception to the general requirement upon a consent authority to grant consent for controlled activities.
21. Under section 104 of the RMA, when considering an application for resource consent, a consent authority must not grant a resource consent contrary to section 55 of MACA.
22. Together these provisions mean that in the absence of written approval from the relevant PCRs group, applications for resource consent (including those that are controlled activities) that will, or are likely to, have adverse effects that are more than minor on the exercise of a PCR must not be granted.
23. Depending on the nature of the PCR recognised through a Court order or agreement, section 55(2) could have significant implications for resource consent processes. The current PCR applications are in many cases broad-ranging (both in area and in the description of the rights sought). If the PCRs are recognised in that form, many resource consent applications may not be able to be granted without the approval of the PCR holder. It will be necessary for the consent authority to apply a 'more than minor' effects test, which could be challenging if the PCRs are too broadly framed.

24. Section 55(3) identifies a range of matters that are not affected by a PCR, including (by way of summary):

- (a) coastal permits for existing aquaculture activities;
- (b) a resource consent for emergency activities;
- (c) a resource consent for 'existing accommodated infrastructure' (section 63 of MACA); and
- (d) a resource consent for a 'deemed accommodated activity' (section 65 of MACA).

25. Some of these exemptions are discussed below in relation to CMT.

Notification of resource consent applications

26. If a consent authority does not publicly notify an application for resource consent, it must decide whether there are any affected PCR groups in relation to the activity.

27. Section 95F states that a consent authority must decide that a PCR group is an affected PCR group in relation to an activity in the PCR area, if the activity 'may have adverse effects' on a PCR and the PCR group has not given written approval (or has withdrawn approval before a decision has been made).

28. The consent authority must give limited notification of the application to an affected PCR group, even if a rule or national environmental standard precludes public or limited notification of the application.

Information keeping

29. Section 35(2)(e) of the RMA states that a regional council must monitor the exercise of PCRs in its region, including any controls imposed on the exercise of that right and take appropriate action (having regard to the methods available to it under this Act) where this is shown to be necessary.

30. Section 35(5)(jb) of the RMA identifies the information that a regional council must keep which includes records of every protected customary rights order or agreement relating to a part of the common marine and coastal area within its region.

Planning

31. Significantly, section 85A of the RMA states that a plan or proposed plan must not include a rule that describes an activity as a permitted activity if that activity will, or is likely to, have an adverse effect that is more than minor on a PCR.

31.1 Where a PCR group considers that a rule in a plan or proposed plan does not comply with section 85A, the holder may make a submission on a proposed plan to the local authority concerned, request a change to the plan, or apply to the Environment Court for a change to a rule in the plan or proposed plan. There are particular criteria to be applied under section 85B.

Customary Marine Title

32. A CMT confers a number of rights on the CMT group, including:

- (a) an RMA permission right;
- (b) a conservation permission right;

- (c) a wāhi tapu protection right; and
- (d) the right to create a planning document.

RMA permission right

33. A significant implication of CMT is that an RMA permission right is created. This means under section 68 of MACA that, despite a grant of resource consent, the consented activity may not be commenced in the CMT area without permission of the CMT group:

68 Effect of RMA permission right

- (1) *The holder of a resource consent for an activity in a customary marine title area to which an RMA permission right applies must not commence the activity to which the consent applied unless—*
 - (a) *permission has been given by the relevant customary marine title group under section 66(2) for that activity; and*
 - (b) *the permission covers the activity to which the resource consent applies.*
- (2) *To avoid doubt, a decision of a customary marine title group to give or to decline permission for an activity is not subject to—*
 - (a) *a right of appeal; or*
 - (b) *a right of objection under section 357 or 357A of the Resource Management Act 1991.*

(emphasis added)

34. A decision of a CMT group to give or to decline permission for an activity is not subject to appeal or objection.
35. Sections 66 and 67 of MACA provide further guidance on the scope and procedure of an RMA permission right:
- (a) the right applies to activities that are to be carried out under a resource consent, including for a controlled activity, to the extent that the resource consent is for an activity to be carried out within a CMT area;
 - (b) the right does not apply to the grant or exercise of a resource consent for an "accommodated activity", as discussed in the exemptions section of this Memorandum;
 - (c) an applicant must make a request for permission by notice to the relevant CMT group and may do so at any time before the relevant resource consent commences;
 - (d) the CMT group must notify in writing its decision on a request for permission to the applicant and the relevant consent authority;
 - (e) a CMT group may give or decline permission on any grounds and the decision cannot be revoked;
 - (f) a CMT group must notify the applicant of its decision within 40 working days after receiving notice from the applicant that they have been granted consent, after this time the CMT group will be treated as having given permission; and
 - (g) it is an offence to commence the activity in the relevant CMT area without the permission.

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36. Section 116 of the RMA which relates to the commencement of a resource consent, is consequentially amended to give effect to the RMA permission right.

Conservation permission right

37. A 'conservation permission right' operates in a similar way to the RMA permission right, enabling a CMT group to give or decline permission to the establishment of, for example, reserves, marine reserves or other conservation protected areas. This is a matter that will be relevant to local authorities in relation to the establishment of reserves below the line of mean high water springs.

Wāhi tapu protection right

38. In accordance with section 78, a CMT group may seek to include recognition of a wāhi tapu or a wāhi tapu area in a CMT order or agreement. A wāhi tapu protection right may be recognised if there is evidence to establish the connection of the group with the wāhi tapu or wāhi tapu area in accordance with tikanga and that to protect the area the group requires access prohibitions or restrictions.
39. If CMT is recognised, the CMT order or agreement must set out the wāhi tapu conditions that apply in accordance with section 79:
- (a) the location of the boundaries of the wāhi tapu or wāhi tapu area that is the subject of the order;
 - (b) the prohibitions or restrictions that are to apply, and the reasons for them; and
 - (c) any exemption for specified individuals to carry out a PCR in relation to, or in the vicinity of, the protected wāhi tapu or wāhi tapu area, and any conditions applying to the exercise of the exemption.

40. Section 104 of the RMA was amended so that a consent authority must not grant a resource consent contrary to wāhi tapu conditions included in a CMT order or agreement.

Planning document

41. Section 85 of MACA provides a CMT group with the right to prepare a planning document in accordance with its tikanga. The purposes of the planning document are to identify issues relevant to the regulation and management of the CMT area, to set out the regulatory and management objectives of the group for its CMT area and to set out policies for achieving those objectives.
42. A planning document may include any matter that can be regulated under the specified enactments in section 85(5) of MACA including matters that are relevant to promoting the sustainable management of the natural and physical resources of the CMT title area, and the protection of the cultural identity and historic heritage of the group.
43. The planning document is of no effect until lodged with the relevant regional council, other specified agencies, and the chief executive of Land Information New Zealand. In accordance with section 86 of MACA, the document is deemed to be registered on the day that is 20 working days after it is first lodged with an agency.

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44. Under section 88 of MACA, local authorities that have statutory functions in the district or region where the CMT area is located, on and after the date that a planning document is registered, must take the planning document into account when making any decision under the Local Government Act 2002 in relation to the CMT area.
45. Section 93 of MACA introduces the following obligations on the relevant regional council(s) in relation to a CMT planning document:
- (a) within 20 working days after lodgement of the CMT planning document ('**registration date**'), a regional council must identify the matters in the planning document that relate to resource management issues within its functions under the RMA, to the extent that those matters are relevant within the CMT area to which the planning document relates, and any parts of the common marine and coastal area to which the planning document relates (other than the CMT area);
 - (b) after registration date, a regional council must initiate a process to determine whether to alter its RPS or regional plans, if and to the extent that any alteration would achieve the purpose of the RMA and either 'recognise and provide for' or 'take into account' the matters identified in (a) above (depending upon whether the planning document is referring to matters within or outside of the CMT area). That process must commence no later than the first proposed plan change, variation or review of the RPS or regional plan; and
 - (c) until regional planning document alterations in accordance with this section become operative or a timeframe has passed after notification that alterations will not be made, a regional council must:
 - (i) attach the planning document(s) to copies of its relevant RMA documents; and
 - (ii) when considering a resource consent application for an activity that would, if the consent were granted, directly affect, wholly or in part, the area to which the planning document applies, have regard to any matters identified in (a) above.
46. The planning document is also referred to in the provisions of the RMA set out below:

61 Matters to be considered by regional council (policy statements)

(...)

(2A) *When a regional council is preparing or changing a regional policy statement, it must deal with the following documents, if they are lodged with the council, in the manner specified, to the extent that their content has a bearing on the resource management issues of the region:*

- (a) *the council must take into account any relevant planning document recognised by an iwi authority; and*
- (b) *in relation to a planning document prepared by a customary marine title group under section 85 of the Marine and Coastal Area (Takutai Moana) Act 2011, the council must, in accordance with section 93 of that Act,—*
 - (i) *recognise and provide for the matters in that document, to the extent that they relate to the relevant customary marine title area; and*
 - (ii) *take into account the matters in that document, to the extent that they relate to a part of the common marine and coastal area outside the customary marine title area of the relevant group.*

(...)

66 **Matters to be considered by regional council (plans)**

(...)

- (2A) *When a regional council is preparing or changing a regional plan, it must deal with the following documents, if they are lodged with the council, in the manner specified, to the extent that their content has a bearing on the resource management issues of the region:*
- (a) *the council must take into account any relevant planning document recognised by an iwi authority; and*
 - (b) *in relation to a planning document prepared by a customary marine title group under section 85 of the Marine and Coastal Area (Takutai Moana) Act 2011, the council must, in accordance with section 93 of that Act,—*
 - (i) *recognise and provide for the matters in that document, to the extent that they relate to the relevant customary marine title area; and*
 - (ii) *take into account the matters in that document, to the extent that they relate to a part of the common marine and coastal area outside the customary marine title area of the relevant group.*

...

104 **Consideration of applications**

(...)

- (2B) *When considering a resource consent application for an activity in an area within the scope of a planning document prepared by a customary marine title group under section 85 of the Marine and Coastal Area (Takutai Moana) Act 2011, a consent authority must have regard to any resource management matters set out in that planning document.*
- (2C) *Subsection (2B) applies until such time as the regional council, in the case of a consent authority that is a regional council, has completed its obligations in relation to its regional planning documents under section 93 of the Marine and Coastal Area (Takutai Moana) Act 2011.*

47. There have also been a number of obligations included in Schedule 1 of the RMA in relation to CMT groups.

Notification of resource consent applications

48. If a consent authority does not publicly notify an application for resource consent, it must decide whether there are any affected CMT groups in relation to applications for accommodated activities.
49. Section 95G states that a consent authority must decide that a CMT group is affected in relation to an activity in the CMT area, if the activity 'may have adverse effects' on the exercise of rights applying to a CMT group and the CMT group has not given written approval (or has withdrawn approval before a decision has been made).
50. The consent authority must give limited notification of the application to an affected CMT group or even if a rule or national environmental standard precludes public or limited notification of the application.

Part D: Exemptions

51. There are a number of provisions set out in MACA to exempt certain activities from the operation of PCRs and CMT and, for example, the RMA permission right.
52. By way of summary, MACA approaches this through a complex set of definitions with references to concepts such as:
 - (a) 'accommodated activities'¹ and 'accommodated infrastructure' - which include existing lawfully established infrastructure that meets specified thresholds including in relation to national or regional significance; and
 - (b) 'deemed accommodated activities'² - which includes the proposed construction of infrastructure where the Minister of Land Information classifies the proposal as a 'deemed accommodated activity' so that it is exempt from CMT and the RMA permission right.
53. There is some uncertainty as to how the exemption provisions will be interpreted. For example, it is not clear what proposed infrastructure would meet the test of being "essential for the social or economic wellbeing of the region" so as to meet the threshold for a deemed accommodated activity. As noted, the exemption definitions are complex and a careful assessment will be required in the individual circumstances of each activity. This is relevant to local authorities both from a regulatory and an infrastructure perspective.

Conclusion

54. Clearly, local authorities will need to work through the implications of MACA for their region or district. This will be particularly important for RMA planning and consenting processes, and for consenting of proposed infrastructure. It will take some time to understand the type of orders that may be issued by the Court, and equally the type of agreements that may be entered into by the Crown. It will also be important to understand how the exemptions in MACA are interpreted. Those outcomes will have a significant bearing on the ultimate implications of MACA for local authorities.
55. We trust this Memorandum is of assistance in providing an overview of those implications.

Ngā mihi, nui



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¹ Section 64 of MACA.
² Section 65 of MACA.

